Office of the State Appellate Defender

Illinois Criminal Law Digest

December 2014

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ACCOUNTABILITY

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People v. Johnson, 2014 IL App (1st) 122459-B (No. 1-12-2459, 12/31/14)

Under 720 ILCS 5/5-2(c) a person is accountable for the conduct of another if "either before or during the commission of an offense, with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." Accountability cannot be established by merely showing that the defendant knew of or consented to the commission of the offense. It also cannot be established by defendant's mere presence at the scene of the crime even if coupled with defendant's flight from the scene or his knowledge that a crime has occurred.

Here, the State's evidence showed that defendant was driving a car with his co-defendant as a passenger. At some point, co-defendant saw a man named Brandon driving another vehicle. Co-defendant identified Brandon as the "dude that shot me," and told defendant to chase him. Defendant pursued the other car and eventually stopped in front of it. Co-defendant got out of the car, pulled out a gun, and fired several shots at Brandon. Brandon tried to drive away and in the process struck defendant's car. Defendant drove down the street and while co-defendant was still firing the gun, told him to "come on or I'm going to leave you." Co-defendant ran towards defendant's car still firing his gun. Co-defendant got back in the car and defendant drove away. Brandon eventually died from the gunshots. Defendant later told an acquaintance that co-defendant had been armed, and they had "made a move" on (meaning shot) a man in another vehicle.

The Appellate Court held that this evidence failed to prove that defendant was guilty by accountability for first degree murder. Even though he drove the co-defendant to the scene of the crime and then helped him escape, there was no evidence that defendant was involved in any advanced planning or had a prior intent to facilitate the shooting since defendant did not even know the co-defendant before he entered the car, let alone that he was armed and intended to shoot someone.

There was also no evidence that defendant participated in a common criminal design since defendant did nothing to assist the co-defendant during the crime. Driving someone away from the scene of the crime does not establish accountability. Nor does presence at the crime scene coupled with knowledge that a crime has occurred and subsequent flight.

The fact that co-defendant identified Brandon as the man who shot him does not prove that defendant intended to help him shoot Brandon. And even though co-defendant instructed defendant to chase Brandon, there was no evidence as to why co-defendant asked him to do this. Defendant's statement to an acquaintance that co-defendant was armed and they "made a move" on Brandon were merely after-the-fact accounts of the events and do not establish what defendant's intent was prior to the shooting. They also do not show when defendant learned that co-defendant was armed. As a result, the

Appellate Court concluded that the State failed to prove beyond a reasonable doubt that defendant intended to facilitate the murder either before or during the shooting. The court therefore reversed defendant's first degree murder conviction.

APPEAL

§2-1
People v. McCaslin, 2014 IL App (2d) 130571 (No. 2-13-0571, 12/11/14)

1. A defendant has a constitutional right to appeal a criminal conviction, but may waive that right through neglect or by conscious choice. An agreement not to appeal should be enforced unless the defendant can show that it was made involuntarily or unintelligently or suffers from some similar infirmity.

2. Defendant pleaded guilty to burglary and as part of the plea agreement was accepted into a drug-court program. The agreement provided that sentencing would be deferred until the successful completion of or unsuccessful discharge from the drug-court program. The plea agreement also stated that if the defendant "commits a new felony offense" the State would file a petition to discharge defendant from the program. As a condition of entering the program, defendant executed a document which stated: "I waive any and all rights to appeal I may have in the event I am dismissed from the [drug-court program] and understand and consent to the Court and . . . Drug Court Team being the sole authority for determining such dismissal."

The State subsequently filed a petition to terminate defendant's participation in the drug-court program, alleging that he had been charged with a felony in another county. At the hearing on the petition, defendant argued that the State was required to show that he had committed a new felony, not merely that he had been charged. The trial court granted the petition to terminate, and defendant appealed.

The Appellate Court dismissed the appeal, finding that defendant had waived his right to appeal and agreed that the trial court and drug-court team would determine whether he should be dismissed from the program. Furthermore, the record showed that the waiver of the right to appeal was voluntary and intelligent where the trial court ascertained that defendant understood the agreement and defense counsel indicated that he had discussed the agreement with defendant. The court rejected the argument that the trial court was required to specifically admonish a defendant who waives his appellate rights, noting that Illinois Supreme Court Rule 402, which specifies the admonishments to be given before accepting a guilty plea, does not require any specific admonishment concerning a waiver of the right to appeal.

3. In a concurring opinion, Justice Jorgensen agreed that defendant waived his appellate rights but stated that "such sweeping waivers can have a detrimental effect

on the integrity and sustainability of drug-court programs." Justice Jorgensen criticized the use of waivers of appellate rights as occurred in this case because drug-court programs are afforded "virtually unfettered authority" to terminate participants from the program without permitting any challenge to the State's failure to prove that the agreement has been violated.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

§2-1

People v. Reid, 2014 IL App (3rd) 130296 (No. 3-13-0296, 12/15/14)

After he was convicted of first degree murder, defendant agreed to waive his right to appeal and his right to file a post-conviction petition. In return, the State agreed to not seek a death sentence. Defendant subsequently filed a direct appeal, which the Appellate Court heard after finding that the trial court had given improper admonishments regarding the waiver of appellate rights.

Defendant then filed a post-conviction petition which was dismissed as frivolous and patently without merit. The Appellate Court affirmed the dismissal order, holding that defendant had been properly admonished concerning the waiver of his right to file a post-conviction petition.

1. Because a waiver of the right to appeal resembles a guilty plea, before accepting such a waiver the trial court must admonish defendant under Supreme Court Rule 605. However, because no specific admonishments are prescribed by statute or rule, the validity of a waiver of the right to file a post-conviction petition is determined under general constitutional standards. Thus, a waiver of the right to file a post-conviction petition is valid if it represents an intelligent and voluntary relinquishment of a known right.

2. The court concluded that defendant's waiver of his right to pursue post-conviction relief was knowing and voluntary where the trial court explained in open court that defendant had the right to seek post-conviction relief, explained that post-conviction proceedings would occur after the direct appeal was complete, and stated that agreeing to the waiver would mean that defendant "could take no further legal action" to challenge his conviction. The court found that the trial judge was not required to discuss the specific process of post-conviction proceedings, including the standard to be applied at first-stage proceedings and the right to receive a free transcript.

Because defendant's waiver of post-conviction proceedings was proper and could be enforced, the trial court's order denying the petition as frivolous was affirmed.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

§2-6(a)

People v. Bernard, 2014 IL App (2d) 130924 (No. 2-13-0924, 12/10/14)

Other than deciding whether it has jurisdiction, a reviewing court normally will not search the record for unargued and unbriefed reasons to reverse the trial court. Instead, courts normally only decide questions presented by the parties. But under Illinois Supreme Court Rule 366(a)(5), a reviewing court "may, in its discretion, and on such terms as it deems just...make any other or further orders and grant any relief, including a remandment...that the case may require."

Here, the trial court denied defendant's motion to withdraw her guilty plea and defendant appealed. The Appellate Court remanded the case back to the trial court because of a Rule 604(d) violation. Although defendant filed a new motion to withdraw, the trial court again denied the defendant's motion because the original motion had not been timely filed.

Defendant did not raise any issue about the trial court erroneously denying the post-remand motion based on reasons that would only apply to the original motion. The Appellate Court, however, addressed the issue on its own, stating that it had "no confidence in a decision that is so obviously based on a confused and incorrect understanding of the status of the case." The case was remanded for a new hearing on the motion to withdraw.

§2-6(b)

People v. McCoy, 2014 IL App (2d) 130632 (No. 2-13-0632, 12/22/14)

1. An appeal is moot where it presents no actual controversy and intervening events make it impossible for the reviewing court to grant effective relief. Reviewing courts do not decide moot issues unless an exception to the mootness doctrine applies.

Although defendant had been restored to fitness by the time the Appellate Court considered his appeal concerning his right to demand a jury determination of fitness, the court found that two exceptions to the mootness doctrine applied. Therefore, the court elected to reach the issue.

2. First, a court may elect to reach moot issues that are capable of repetition yet evade review. This exception applies where: (1) the challenged action is of such short duration that it cannot be litigated before the action ceases, and (2) there is a reasonable expectation that the complaining party will be subjected to the same action again. This exception generally does not apply where factual issues are raised, but does apply where purely legal questions are at issue.

Here, a purely legal issue was involved - whether an arguably unfit defendant is entitled to demand a jury determination of fitness. In addition, the court found that it was unlikely defendant could bring a timely challenge to the trial court's refusal to allow a jury determination of fitness.

Finally, because the defendant had exhibited mental health issues, there is a reasonable expectation that questions regarding his fitness will recur and that the trial court will continue to ignore defendant's demands for a jury. Under these circumstances, the exception to the mootness doctrine for issues that are capable of repetition yet evade review applies.

3. Second, the public interest exception to the mootness doctrine applies. Review of an otherwise moot issue is permitted under this exception where the question presented is of a public nature, an authoritative determination is desirable for guidance of public officers, and the question is likely to recur. The court noted that there is no authoritative precedent concerning whether an arguably unfit defendant may demand a jury determination of fitness, and that the issue is one of public interest. In addition, the court held that the question would likely recur in view of defendant's mental health history.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

ARMED VIOLENCE

§3-3

People v. Cherry, 2014 IL App (5th) 130085 (No. 5-13-0085, 12/10/14)

Aggravated battery occurs where the accused: (1) intentionally or knowingly causes great bodily harm while committing a battery (720 ILCS 5/12-4(a)), or (2) commits a battery while using a deadly weapon other than by "the discharge of a firearm." (720 ILCS 5/12-4.2(a)(1)). The offense of aggravated battery with a firearm occurs when in committing a battery the accused knowingly or intentionally causes any injury to another person by means of discharging a firearm. 720 ILCS 5/12-4(a)(1), (b).

720 ILCS 5/33A-2(b) defines armed violence as personally discharging a firearm that is a Category 1 or Category 2 weapon while committing any felony other than certain specified felonies "or any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range."

Defendant was convicted of one count of aggravated battery with a firearm and one count of armed violence predicated on aggravated battery. The armed violence charge

alleged that defendant caused great bodily harm "while armed with a dangerous weapon" by shooting the complainant in the leg with a handgun that was a Category I weapon.

1. The Appellate Court held that under the plain language of §33A-2(b), armed violence cannot be predicated on any form of aggravated battery even where that offense is charged under §12-4(a). The court concluded that because aggravated battery with a firearm is an enhanced version of aggravated battery, §33A-2(b) specifically excludes the latter offense as a predicate for armed violence.

Noting that defendant was also convicted of aggravated battery with a firearm based on the same conduct, the court stated:

> [I]t would be patently unreasonable to conclude that the prosecution may both charge the defendant with an enhanced version of an offense and then also predicate an armed violence charge on a subsection of the same basic offense that does not specifically address weapons in order to sidestep the statutory exclusions.

The conviction for armed violence was vacated and the cause remanded for sentencing on the remaining conviction of aggravated battery while armed with a firearm.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

BATTERY

§7-1(a)(1)

People v. Gabriel, 2014 IL App (2d) 130507 (No. 2-13-0507, 12/22/14)

An order of protection required that defendant: (1) stay at least 1000 feet from the petitioner's residence and school, and (2) refrain from entering or remaining at the College of DuPage while the petitioner was present. Defendant was arrested as he was leaving the campus of the College of DuPage. No evidence was presented that the petitioner was on the campus that day.

In convicting defendant of violating the order of protection, the trial court concluded that the order was unambiguous and required defendant to stay off the campus at all times, without regard to whether the petitioner was present. The Appellate Court reversed, finding that the evidence was insufficient to establish that defendant knowingly violated the order of protection.

1. The Illinois Domestic Violence Act provides that an order of protection may require the respondent to "stay away from petitioner . . . or prohibit [the] respondent

from entering or remaining present at petitioner's school, place of employment, or other specified places at times when petitioner is present." 750 ILCS 60/214(b)(3). Although the order of protection in this case was ambiguous, the court assumed that the trial judge intended to enter an order that complied with the statute. Because the statute would not authorize an order that precluded defendant from entering the campus when the petitioner was not there, the trial court's interpretation would result in an order of protection that was beyond the scope of the statute.

The court concluded that the order should be construed as requiring defendant to stay away from the College of DuPage only when the petitioner was present. In the absence of any evidence that the petitioner was on campus at the time in question, the evidence was insufficient to show that the order of protection was violated.

2. Although defendant did not argue that the trial court's interpretation of the order exceeded the scope of the statute, the court elected to reach the issue. The court noted that defendant challenged the trial court's interpretation of the order, the issue concerned the legal authority of the trial court to issue an order of protection, and the State was given an opportunity to respond.

3. In the course of its opinion, the court noted that the order of protection utilized a standard form order that is used throughout the State. "To avoid further confusion on the part of courts, law enforcement officials, and especially the members of the public who may in the future obtain or be subjected to orders under the Act, we advise that the form order be amended as needed."

The court also noted a conflict in authority concerning whether ambiguous orders of protection should be construed in the defendant's favor. The court declined to decide this issue, finding that the trial court's interpretation was improper no matter what standard was used.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

COLLATERAL REMEDIES

§9-1(a)

People v. Reid, 2014 IL App (3rd) 130296 (No. 3-13-0296, 12/15/14)

After he was convicted of first degree murder, defendant agreed to waive his right to appeal and his right to file a post-conviction petition. In return, the State agreed to not seek a death sentence. Defendant subsequently filed a direct appeal, which the Appellate Court heard after finding that the trial court had given improper admonishments regarding the waiver of appellate rights.

Defendant then filed a post-conviction petition which was dismissed as frivolous and patently without merit. The Appellate Court affirmed the dismissal order, holding that defendant had been properly admonished concerning the waiver of his right to file a post-conviction petition.

1. Because a waiver of the right to appeal resembles a guilty plea, before accepting such a waiver the trial court must admonish defendant under Supreme Court Rule 605. However, because no specific admonishments are prescribed by statute or rule, the validity of a waiver of the right to file a post-conviction petition is determined under general constitutional standards. Thus, a waiver of the right to file a post-conviction petition is valid if it represents an intelligent and voluntary relinquishment of a known right.

2. The court concluded that defendant's waiver of his right to pursue post-conviction relief was knowing and voluntary where the trial court explained in open court that defendant had the right to seek post-conviction relief, explained that post-conviction proceedings would occur after the direct appeal was complete, and stated that agreeing to the waiver would mean that defendant "could take no further legal action" to challenge his conviction. The court found that the trial judge was not required to discuss the specific process of post-conviction proceedings, including the standard to be applied at first-stage proceedings and the right to receive a free transcript.

Because defendant's waiver of post-conviction proceedings was proper and could be enforced, the trial court's order denying the petition as frivolous was affirmed.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

§9-1(e)(2)

People v. White, 2014 IL App (1st) 130007 (No. 1-13-0007, 12/18/14)

At the first stage of post-conviction proceedings, a petition may be dismissed as frivolous or patently without merit if it has no arguable basis either in law or fact, meaning it is based on an indisputably meritless legal theory or fanciful factual allegations. A first-stage petition claiming actual innocence based on newly discovered evidence must present evidence that is arguably new, material, non-cumulative, and so conclusive it would probably change the result on retrial.

The trial evidence in this case included two witnesses who identified defendant in-court as the offender, two who identified defendant out-of-court, but disavowed the identifications at trial, and two who testified that defendant was not the offender. After his conviction was affirmed on direct appeal, defendant filed a post-conviction petition supported by the affidavit of a witness who averred that he was present at the shooting, saw the man who committed the offense, and defendant was not the offender. Instead,

the actual offender was much younger and smaller than defendant. He further averred that he was pressured and threatened by another man to falsely identify defendant as the offender. The trial court dismissed the petition at the first stage.

The Appellate Court reversed the first-stage dismissal. Although the Appellate Court found that the trial evidence "weighed heavily in the State's favor," it held that defendant made an arguable claim of actual innocence in his petition. First, even though defendant knew about the witness's presence at the crime scene, his testimony was arguably newly discovered because the pressure and threats to falsely identify defendant meant that his exculpatory testimony would not have been available to defendant at the time of trial.

Second, the evidence was arguably material and non-cumulative because it provided an additional description of the offender and additional testimony that defendant was not the offender. Finally, the evidence would arguably change the result on retrial. The allegations in the affidavit were neither fantastical nor delusional, were not positively rebutted by the record, and supported defendant's version of the conflicting identification evidence presented at trial. The newly discovered evidence thus arguably had the potential to exonerate defendant.

The case was remanded for second-stage proceedings.

§9-1(i)(2)

People v. Smith, 2014 IL 115946 (No. 115946, 12/4/14)

1. Unless an issue of actual innocence is involved, leave to file a successive post-conviction petition may be granted only if the petitioner satisfies the "cause and prejudice" test. 725 ILCS 5/122-1(f). "Cause" is shown by identifying an objective factor that impeded the petitioner's ability to raise a specific claim during the initial post-conviction proceedings. "Prejudice" is demonstrated where the claim in question "so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f).

Section 122-1(f) does not define a standard for determining whether the petitioner has met the cause and prejudice test. In other words, §122-1(f) "does not answer whether a successive post-conviction petitioner must demonstrate cause and prejudice by actively *pleading* it, or by actually *proving* it. If the petitioner is required to prove cause and prejudice, section 122-1(f) does not provide a method for presentation of evidence." Furthermore, the legislature has not heeded the Supreme Court's requests that it provide guidance on this point. See **People v. Evans**, 2013 IL 113471.

In the absence of legislative guidance, the court concluded that where leave to file a successive petition is sought prior to first stage proceedings on the successive petition, cause and prejudice is to be determined on the pleadings rather than based

on evidence. Thus, a *pro se* motion for leave to file a successive post-conviction petition satisfies the cause and prejudice requirement if it alleges facts demonstrating cause and prejudice.

The court noted, however, that a higher standard than the first stage "frivolous or patently without merit" standard is required in order for the trial court to grant leave to file a successive petition. Instead, the petitioner must submit enough documentation to allow the trial judge to determine whether the allegations fail as a matter of law or whether the successive petition and supporting documentation are insufficient to justify further proceedings.

2. Here, the petitioner did not satisfy the prejudice prong of the cause and prejudice test. The motion for leave to file a successive petition claimed that: (1) direct appeal counsel was ineffective for failing to argue that the prosecutor had made improper comments during opening statements, and (2) initial post-conviction counsel provided unreasonable representation where he failed to amend the *pro se* petition to include a claim of ineffective assistance of appellate counsel. To establish prejudice, defendant must show that the claim omitted from the initial petition so infected the entire trial that the resulting conviction violated due process.

This test was not satisfied here. Although the prosecutor commented in opening argument that a witness would testify that defendant had a gun on the night of the shooting, the trial court instructed the jury repeatedly that opening statements were not evidence. In addition, in closing argument the prosecutor acknowledged that defendant did not have a gun. Furthermore, in his closing argument defense counsel pointed out the inconsistency between the State's opening and closing arguments. Finally, defendant was convicted on a theory of accountability. Under these circumstances, erroneously claiming in opening statement that defendant had a gun could not have infected the entire trial to the extent that the resulting conviction violated due process.

(Defendant was represented by Assistant Defender Brian Carroll, Chicago.)

§9-1(j)(2)

People v. Guzman, 2014 IL App (3rd) 090464 (No. 3-09-0464 & 3-10-0802, 12/11/14)

1. A post-conviction petitioner is entitled to reasonable assistance by post-conviction counsel. Reasonable assistance occurs where counsel consults with the petitioner to ascertain his contentions of constitutional deprivation, examines the record of the trial proceedings, and makes any amendments to the petition necessary to adequately present the petitioner's contentions. Supreme Court Rule 651(c). Although post-conviction counsel need not scour the record to discover claims which the petitioner failed to raise, any amendments to the petition that are necessary to adequately present the petitioner's contentions must be made.

Where post-conviction counsel fails to provide reasonable assistance, it is nearly impossible to determine if post-conviction claims have merit. Therefore, the proper remedy is to reverse the order dismissing the petition and remand for further proceedings.

2. Post-conviction counsel failed to provide reasonable assistance where he did not adequately present defendant's claim that trial counsel was ineffective at the guilty plea proceeding for failing to advise defendant of the possibility that he would be deported. Where deportation is a clear consequence of a plea, defense counsel must advise the client that the pending charges may carry a risk of adverse immigration consequences. To show prejudice from the failure to give such advice, defendant must show that had it not been for the failure to advise him, there is a reasonable probability that he would have pleaded not guilty and insisted on going to trial.

In the original post-conviction petition, counsel failed to allege that defendant would not have entered a guilty plea had he been informed of the immigration consequences of the plea. At the second stage hearing, counsel submitted an affidavit stating that trial counsel failed to inform defendant of the immigration consequences. However, there was no claim that defendant would have gone to trial had he known of the likelihood that he would be deported. The trial court dismissed the petition based on the failure to make such a showing.

Counsel then filed an amended petition which contained an unnotarized affidavit stating that defendant would not have pleaded guilty had he been informed that the plea might have immigration consequences. Counsel failed to file a motion to withdraw the notice of appeal before filing the amended petition, however, and the trial court did not take any action.

The court concluded that because post-conviction counsel did not submit a timely affidavit concerning a required element for relief, he failed to make all amendments necessary to ensure that the petition adequately presented the petitioner's claims. The court also noted that the record contained a sufficient basis to believe that defendant would not have entered a guilty plea had he been advised of the immigration consequences of the plea, because he had a plausible defense to the charge and he had family living in the United States. Under these circumstances, counsel failed to provide reasonable assistance.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

CONFESSIONS

§10-1

People v. Stevens, 2014 IL 116300 (No. 116300, 12/18/14)

The privilege against self-incrimination prohibits compelled testimony, but does not prohibit a defendant from testifying voluntarily in matters that may incriminate him. When a defendant testifies in his own behalf he subjects himself to legitimate cross-examination. Although cross-examination is generally limited to the subject matters explored on direct examination, it is proper during cross to pose questions that explain, qualify, discredit, or destroy a defendant's direct testimony, including questions that affect his credibility, even if they involve new material.

At defendant's trial for the aggravated criminal sexual assault of B.P., the State was allowed to introduce evidence that defendant sexually assaulted another woman (R.G.). Both B.P. and R.G. testified that defendant abducted and sexually assaulted them. Defendant testified on direct that he and B.P. had consensual sex. He did not testify about R.G.'s allegations.

On cross, the State was allowed, over objection, to question defendant about R.G.'s allegations. On appeal defendant argued that his right against self-incrimination was violated when he was forced to answer questions about R.G.'s assault.

The Illinois Supreme Court held that the State's questions about R.G.'s assault did not violate defendant's right to self-incrimination. When defendant testified on his own behalf he opened himself up to legitimate cross-examination, including questions that discredited his direct testimony and called his credibility into question. His direct testimony put the issue of consent and his credibility in general in question, and the cross-examination about R.G. discredited defendant on both of those matters. The cross thus did not violate defendant's right against self-incrimination.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Brett Zeeb, Chicago.)

COUNSEL

§13-2

People v. Jamison, 2014 IL App (5th) 130150 (No. 5-13-0150, 12/3/14)

Illinois Supreme Court Rule 401(b) requires that whenever defendant waives counsel, the open-court admonishments mandated by Rule 401(a) must be "taken verbatim" and made part of the record. Trial courts must strictly comply with Rule 401(b).

Here the trial court entered a written order stating that defendant wanted to waive counsel, gave proper admonishments pursuant to Rule 401(a), and accepted the waiver after determining that defendant knowingly and voluntarily waived his right to counsel.

The Appellate Court held that the trial court committed reversible error and failed to strictly comply with Rule 401(b) by not transcribing or otherwise recording verbatim the proceedings where defendant waived counsel. Defendant's conviction was thus reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Richard Whitney, Mt. Vernon.)

§13-4(b)(2)

People v. Guzman, 2014 IL App (3rd) 090464 (No. 3-09-0464 & 3-10-0802, 12/11/14)

1. Where deportation is a clear consequence of a guilty plea, defense counsel must advise the client of the potential immigration consequences of the plea. To establish prejudice for purposes of establishing ineffective assistance of counsel, defendant must demonstrate that had it not been for counsel's failure to adequately advise him, there is a reasonable probability that he would have entered a not guilty plea and insisted on going to trial. Defendant contended that he was not informed of the risk of deportation and that it would have been reasonable to plead not guilty because he had a plausible defense to the charge and had family living in the United States. The court found that under these circumstances defendant showed that he was prejudiced by counsel's failure to advise him of the risk of deportation.

The court stressed that defendant was not required to prove deportation in order to show that he was prejudiced by counsel's faulty advice.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

§§13-4(b)(4), 13-4(b)(5)

People v. Davis, 2014 IL App (4th) 121040 (No. 4-12-1040, 12/8/14)

1. Counsel may be ineffective for misunderstanding applicable law, but his understanding must be viewed in the context of the state of the law at the time the alleged error occurred and counsel is not incompetent for failing to accurately predict that the law will change.

Defendant argued that his trial counsel was ineffective for failing to file a motion to suppress a text message that police recovered from his cell phone without a search

warrant. The Appellate Court rejected this argument since this issue had not been resolved in Illinois at the time of defendant's trial.

Nearly two years after defendant's trial, the United States Supreme Court held that the search-incident-to-arrest exception to the warrant requirement does not extend to cell-phone data. **Riley v. California**, 573 U.S. ___, 134 S.Ct. 2473 (2014). But at the time of defendant's trial, courts across the country were split on this issue, and in Illinois a reasonable argument could have been made that a warrantless search of a cell phone was permissible. A motion to suppress thus would have had a questionable chance of success. The court declined to find that counsel was ineffective for failing predict the future and anticipate **Riley**.

2. The court also held that trial counsel was not ineffective for failing to object to the text message on three evidentiary grounds (lack of foundation, violation of the best evidence rule, and hearsay), since none of these objections would have been successful.

The State introduced evidence that a detective searched defendant's cell phone and found a text message asking to meet defendant "for a 30 or a 40." During defendant's interrogation (recorded on video and played at trial), the detective confronted defendant with this message. The detective then testified that he believed this message was about trying to purchase $30 or $40 of cocaine.

a. The court rejected the foundation argument because it rested on a faulty assumption that the State had to lay a foundation for the introduction of a document. The State, however, never introduced any document. It simply played a video of the interrogation where the detective confronted defendant with the text message and then asked the detective what the message meant. Once the detective testified that he had read the message, there was a proper foundation for him to testify about its contents.

b. The court rejected the best evidence rule argument because it only applies when the contents of a writing are at issue. Here the State did not try to prove the content of the text message; it instead used the text message as circumstantial evidence that defendant intended to deliver cocaine. The actual content of the message did not matter.

c. Finally, the court rejected the hearsay argument because the detective's testimony about the contents of the text message was not offered to prove the truth of the matter asserted in the message. Instead, it was offered to show police investigation and circumstantial evidence of defendant's intent.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Daaron Kimmel, Springfield.)

§13-4(b)(10)

People v. Reed, 2014 IL App (1st) 122610 (No. 1-12-2610, 12/31/14)

Appellate counsel's assessment of the merits of an issue depends on the state of the law at the time of the appeal, and counsel is not incompetent for failing to accurately predict that existing law may change.

Appellate counsel was not ineffective for failing to raise an issue challenging defendant's sentence of life imprisonment based on the trial court's failure to provide separate verdict forms for different theories of first degree murder. The Illinois Supreme Court's decision in **People v. Bailey**, 2013 IL 113690, which provided the basis for this argument, had not been decided at the time of defendant's direct appeal.

Bailey created a new legal rule, expanding its decision in **People v. Smith**, 233 Ill. 2d (2009). **Smith** held that a trial court must provide separate verdict forms for different theories of murder if the failure to do so creates sentencing consequences for defendant. **Bailey** applied **Smith** to the situation where a defendant has a death penalty sentencing hearing conducted by the trial judge. **Bailey** held that the failure to provide separate verdict forms for the different theories of murder precluded the trial judge from imposing a sentence of life imprisonment since a conviction for felony murder alone, which might have been the basis for the jury's general verdict, would not support a life sentence.

Defendant was in the same situation as **Bailey**. The trial judge denied his request for separate jury forms and later imposed a life sentence after conducting a death penalty sentencing hearing. Although **Smith** had been decided at the time of defendant's direct appeal, appellate counsel was not ineffective for failing to anticipate the new rule created in **Bailey** and challenge his life sentence on that basis.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

§13-5(d)(2)(a)

People v. Short, 2014 IL App (1st) 121262 (No. 1-12-1262, mod. op. 12/3/14)

At defendant's trial for attempt first degree murder, unlawful possession of a firearm by a gang member, aggravated unlawful use of a weapon, and aggravated battery with a firearm, the trial court admonished the venire that evidence of gang membership might be presented and asked whether the veniremembers would be able to afford defendant a fair trial in light of such testimony. After the jury was selected, defendant pleaded guilty to unlawful possession of a firearm by a gang member - the only charge to which the gang membership evidence was relevant - and aggravated unlawful use of a weapon. The trial court denied defense counsel's request to have the venire dismissed

and a new jury selected, but informed the jury that contrary to the earlier statements no gang evidence would be presented.

In the post-trial motion, defense counsel argued that he had been ineffective for failing to object to the questioning of veniremembers to determine whether they would be unable to afford defendant a fair trial if gang-related evidence was admitted. The Appellate Court rejected the argument that defense counsel suffered from a conflict of interest because he was required to argue his own ineffectiveness.

1. Whether an attorney has a conflict of interest is a question of law which is reviewed *de novo*. Two categories of conflicts are recognized in Illinois: *per se* conflicts, and actual conflicts.

A *per se* conflict exists where certain facts about a defense attorney's status create, by themselves, a conflict of interest. *Per se* conflicts have been recognized in three situations: (1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel is a former prosecutor who was personally involved in the prosecution. Because arguing one's own ineffectiveness does not fall into any of these three categories, the court rejected the argument that a *per se* conflict of interest existed.

The court also concluded that no actual conflict of interest was shown. To show an actual conflict, defendant must show some specific defect in counsel's strategy, tactics, or decision making that is attributable to the conflict. Because the trial court was aware of the conduct from which the claimed conflict arose, the claim could be resolved based on the record and without any argument by counsel beyond what was presented in the post-trial motion. Thus, counsel was not required to argue his own ineffectiveness.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Jessica Ware, Chicago.)

§13-5(d)(3)(a)(1)

People v. Jolly, 2014 IL 117142 (No. 117142, 12/4/14)

1. Under **People v. Krankel**, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), where the defendant raises a *pro se* claim of ineffective assistance of counsel the trial court must conduct an inquiry into the factual basis for the claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, new counsel need not be appointed. However, new counsel must be appointed if the allegations show possible neglect of the case.

The goal of the **Krankel** proceeding is to facilitate full consideration by the trial court of defendant's *pro se* claims of ineffective assistance, limit the issues on appeal, and create a record on which those issues can be resolved. A preliminary **Krankel** inquiry is intended to be a neutral and non-adversarial proceeding.

2. Noting a conflict in Appellate Court authority, the court concluded that the purpose of a **Krankel** hearing cannot be achieved if the State is allowed to participate in more than a *de minimis* role. "Certainly, the State should never be permitted to take an adversarial role against a *pro se* defendant at the preliminary **Krankel** inquiry."

3. The Supreme Court accepted the State's concession that the trial court erred at the **Krankel** hearing by permitting the State's Attorney to question the *pro se* defendant and the trial attorney, whose effectiveness was questioned by the *pro se* motion and who was no longer representing defendant. Defendant was without representation after his successor counsel, who like the trial attorney was part of the Public Defender's office, was excused when the proceeding started.

The trial court reviewed defendant's claim and allowed defendant to explain but not argue them. The prosecutor was then allowed to question trial counsel at length concerning defendant's *pro se* claims. Defendant was prohibited from cross-examining trial counsel, however, because "the proceeding was not intended to be an evidentiary hearing."

4. Although it accepted the State's concession, the court rejected the argument that the State's participation in the **Krankel** hearing was harmless beyond a reasonable doubt. The court concluded that the appropriate remedy was to remand the cause for a new **Krankel** inquiry without the State's adversarial participation.

(Defendant was represented by Supervisor Martin Ryan, Springfield.)

DISORDERLY, ESCAPE, RESISTING AND OBSTRUCTING OFFENSES

§16-1(a)

People v. Gabriel, 2014 IL App (2d) 130507 (No. 2-13-0507, 12/22/14)

An order of protection required that defendant: (1) stay at least 1000 feet from the petitioner's residence and school, and (2) refrain from entering or remaining at the College of DuPage while the petitioner was present. Defendant was arrested as he was leaving the campus of the College of DuPage. No evidence was presented that the petitioner was on the campus that day.

In convicting defendant of violating the order of protection, the trial court concluded that the order was unambiguous and required defendant to stay off the campus at all

times, without regard to whether the petitioner was present. The Appellate Court reversed, finding that the evidence was insufficient to establish that defendant knowingly violated the order of protection.

1. The Illinois Domestic Violence Act provides that an order of protection may require the respondent to "stay away from petitioner . . . or prohibit [the] respondent from entering or remaining present at petitioner's school, place of employment, or other specified places at times when petitioner is present." 750 ILCS 60/214(b)(3). Although the order of protection in this case was ambiguous, the court assumed that the trial judge intended to enter an order that complied with the statute. Because the statute would not authorize an order that precluded defendant from entering the campus when the petitioner was not there, the trial court's interpretation would result in an order of protection that was beyond the scope of the statute.

The court concluded that the order should be construed as requiring defendant to stay away from the College of DuPage only when the petitioner was present. In the absence of any evidence that the petitioner was on campus at the time in question, the evidence was insufficient to show that the order of protection was violated.

2. Although defendant did not argue that the trial court's interpretation of the order exceeded the scope of the statute, the court elected to reach the issue. The court noted that defendant challenged the trial court's interpretation of the order, the issue concerned the legal authority of the trial court to issue an order of protection, and the State was given an opportunity to respond.

3. In the course of its opinion, the court noted that the order of protection utilized a standard form order that is used throughout the State. "To avoid further confusion on the part of courts, law enforcement officials, and especially the members of the public who may in the future obtain or be subjected to orders under the Act, we advise that the form order be amended as needed."

The court also noted a conflict in authority concerning whether ambiguous orders of protection should be construed in the defendant's favor. The court declined to decide this issue, finding that the trial court's interpretation was improper no matter what standard was used.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

§16-1(a)

People v. Holm, 2014 IL App (3rd) 130582 (No. 3-13-0582, 12/8/14)

720 ILCS 125/2(a) creates the offense of interfering with the lawful taking of wildlife or aquatic life where one obstructs or interferes with hunters or fishermen with

the specific intent to prevent the lawful taking of animals. However, §125/2(a) exempts from the offense "landowners, tenants, or lease holders exercising their legal rights to the enjoyment of land, including, but not limited to, farming and restricting trespass."

As a matter of first impression, the court concluded that defendant was entitled to the above exemption where he remained at all times on the property where he resided, but drove an ATV along the fence while two men were attempting to hunt on adjoining property. At the same time, defendant's son walked along the fence line and shouted, whistled, clapped his hands, and made other loud noises. When questioned by a conservation officer, defendant admitted that he knew the other two men were attempting to hunt.

The court concluded that the actions of defendant and his son constituted the legal use of their own land, and that the plain language of §125/2 therefore exempted them from the offense. The court also noted that §125/2 was intended to apply to protesters at game preserves and hunting clubs, and not to persons who legally use their own property.

The court rejected the argument that the defendant was not engaged in the legal use of his land because his conduct was performed with the specific intent of preventing hunters on adjacent lands from taking animals. Because the statute applies only where the defendant has the specific intent to prevent hunters from taking wild animals, "[t]he exemption [for acts committed on one's land] is meaningful only if it applies to exempt defendants who acted with the intent to prevent but did so through the legal use of their own property."

§16-2

People v. Shenault, 2014 IL App (2d) 130211 (No. 2-13-0211, 12/23/14)

1. 720 ILCS 5/31-1(a) provides that a person commits the offense of resisting or obstructing a police officer if he or she "knowingly resists or obstructs the performance by one known to the person to be a peace officer." Under Illinois law, resisting or obstructing an officer is not committed where a citizen merely argues with an officer about the validity of an arrest. Instead, the citizen must in some way impose an obstacle which impedes, hinders, interrupts, or delays the performance of the officer's duties. In **People v. Baskerville**, 2012 IL 111056, the Supreme Court held that the focus of §31-1(a) is whether the defendant's conduct tends to impose such an obstacle, and not merely whether a physical act occurred.

Where a driver or passenger refuses to comply with an order to exit the vehicle during a traffic stop, issues of officer safety are presented. "It seems clear that any behavior that actually threatens an officer's safety or even places an officer in fear for

his or her safety is a significant impediment to the officer's performance of his or her duties." **People v. Synnott**, 340 Ill. App. 3d 223, 811 N.E.2d 236 (2nd Dist. 2004).

2. Here, defendant refused to get out of her car when ordered to do so during a traffic stop. After several requests, the officer removed the defendant's seatbelt, pulled her out of the vehicle, and placed her under arrest.

The court concluded that defendant's repeated refusals to exit her car required the officer to place his safety at issue by forcibly removing her, and therefore impeded the officer in his authorized duties. The conviction was affirmed.

(Defendant was represented by Assistant Defender Richard Harris, Elgin.)

EVIDENCE

§19-7(b)

People v. Shenault, 2014 IL App (2d) 130211 (No. 2-13-0211, 12/23/14)

1. Ordinarily, an offer of proof is necessary to preserve a claim of error arising from the exclusion of evidence. An offer of proof informs the trial judge and opposing counsel of the nature of the offered evidence and provides the reviewing court with a record on which it can determine whether exclusion of the evidence was erroneous and prejudicial.

Defendant was charged with resisting or obstructing a peace officer by driving away from a traffic stop without authorization. Defendant claimed that she heard the officer say that "you" are free to go, and believed that his remark referred to her. The trial court sustained hearsay objections when the defense sought to elicit the officer's remarks from other witnesses.

The court concluded that in the absence of an offer of proof, it could not determine whether the testimony which defendant sought to elicit would have had any appreciable value to corroborate defendant's testimony or whether exclusion of the testimony caused prejudice.

2. The court also found that the failure to make an offer of proof cannot be evaluated under the plain error rule. The first step in applying the plain error doctrine is determining whether reversible error occurred. Where the issue is whether evidence was improperly excluded, the failure to make a proper offer of proof prevents the court from making such a determination.

(Defendant was represented by Assistant Defender Richard Harris, Elgin.)

§§19-8(b), 19-24(a)

People v. Cervantes, 2014 IL App (3d) 120745 (No. 3-12-0745, 12/3/14)

When a defendant raises a theory of self-defense, the victim's violent character is relevant to the issue of which party was the initial aggressor. But evidence of defendant's violent character is admissible only when the defendant puts his own character at issue by introducing evidence that he is peaceful. **People v. Devine**, 199 Ill. App. 3d 1032 (3rd. Dist. 1990); **People v. Harris**, 224 Ill. App. 3d 649 (3rd. Dist. 1992).

In his jury trial for first degree murder, defendant raised self-defense and argued that the victim was the initial aggressor. To support his defense, he introduced evidence that the victim had a violent character. In rebuttal, the State was allowed to introduce three prior convictions of defendant for crimes of violence.

The Appellate Court held that the introduction of the prior crimes evidence was improper. The defense strategy focused on the victim's violent character but did not attempt to prove defendant's peaceful character. Accordingly, defendant's prior convictions were not admissible. The court specifically rejected the State's argument that when a defendant remains silent about his own character he is suggesting that he is peaceful. This argument ignores, and is contrary to, the presumption of innocence and the right to remain silent.

The erroneous admission of other crimes evidence creates a high risk of prejudice and ordinarily calls for reversal. Here the prejudice caused by the improper introduction of three prior convictions for violent crimes was magnified when the trial court gave an improper jury instruction that allowed the jury to consider as substantive evidence three other prior convictions that were properly admitted only to impeach defendant. Consequently, the Appellate Court reversed defendant's conviction and remanded for a new trial.

The dissenting justice would have held that **Devine** and **Harris** were wrongly decided and that the prior convictions were admissible. A defendant who raises an initial aggressor self-defense argument, but remains silent about his character at trial, necessarily suggests that he is peaceful. It would be "illogical and unfair" to allow defendant to introduce evidence of the victim's past violent acts but prevent the State from introducing similar evidence about the defendant.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

§§19-10(a), 19-28(a)

People v. Davis, 2014 IL App (4th) 121040 (No. 4-12-1040, 12/8/14)

Defendant argued that his trial counsel was ineffective for failing to object to the introduction of a text message used to prove his intent to deliver cocaine. The State introduced evidence that a detective searched defendant's cell phone and found a text message asking to meet defendant "for a 30 or a 40." During defendant's interrogation (recorded on video and played at trial), the detective confronted defendant with this message. The detective then testified that he believed this message was about trying to purchase $30 or $40 of cocaine.

Defendant argued that counsel should have objected to the text message on three grounds: (1) lack of foundation; (2) violation of the best evidence rule; and (3) hearsay. The Appellate Court held that counsel was not ineffective since none of these objections would have succeeded.

1. The court rejected the foundation argument because it rested on a faulty assumption that the State had to lay a foundation for the introduction of a document. The State, however, never introduced any document. It simply played a video of the interrogation where the detective confronted defendant with the text message and then asked the detective what the message meant. Once the detective testified that he had read the message, there was a proper foundation for him to testify about its contents.

2. The court rejected the best evidence rule argument because it only applies when the contents of a writing are at issue. Here the State did not try to prove the content of the text message; it instead used the text message as circumstantial evidence that defendant intended to deliver cocaine. The actual content of the message did not matter.

3. Finally, the court rejected the hearsay argument because the detective's testimony about the contents of the text message was not offered to prove the truth of the matter asserted in the message. Instead, it was offered to show police investigation and circumstantial evidence of defendant's intent.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Daaron Kimmel, Springfield.)

§§19-10(b), 19-10(c), 19-27(a), 19-27(f), 19-28(b)

People v. Coleman, 2014 IL App (5th) 110274 (No. 5-11-0274, 12/31/14)

1. Under Frye, scientific evidence is admissible only if the methodology or scientific principle is sufficiently established to have gained general acceptance in its particular

field. But Frye only applies to scientific evidence. If an expert's opinion is derived solely from his observations and experiences, it is not scientific evidence.

Following a Frye hearing, the State was allowed to introduce the testimony of an expert linguist who compared and found similarities between written material produced by the offender and written material produced by defendant. Defendant argued that it was error to admit this evidence because the field of authorship attribution was new and more research was needed before it could become a reliable scientific tool.

The court held that this testimony was not scientific and thus was not subject to the Frye test. The expert did not apply scientific principles in rendering his opinion. He instead relied on his skill and experience-based observations in pointing out similarities between the written material produced by the offender and defendant, and never gave an opinion about who was the actual author of the offender's writings. The testimony was thus properly admissible.

2. The trial court properly admitted the testimony of five witnesses about hearsay statements made by the decedent, defendant's wife, that defendant wanted a divorce. This evidence was properly admissible (a) under the statutory hearsay exception for the intentional murder of a witness; (b) under the doctrine of forfeiture by wrong doing; and (c) to establish defendant's motive.

(a) Under 725 ILCS 5/115-10.6(a), a hearsay statement is admissible if it is offered against a defendant who killed the declarant to prevent her from being a witness in a criminal or civil proceeding. The statute requires a pretrial hearing to determine the admissibility of the statements.

Here the trial court properly found at the pretrial hearing that defendant murdered his wife to prevent her from being a witness at a potential dissolution proceeding. Moreover, the statutory provision applies even though defendant had not initiated divorce proceedings.

(b) The common law doctrine of forfeiture by wrongdoing provides a hearsay exception for out-of-court statements made by an unavailable witness if the defendant intentionally prevented the witness from testifying. Here defendant intentionally prevented his wife from testifying by killing her, and thus her out-of-court statements were admissible.

(c) The deceased wife's out-of-court statements were also admissible to show defendant's motive. Her statements indicated that defendant wanted a divorce but might lose his job if he tried to obtain one. The statements thus provided a motive for killing her.

3. The trial court did not abuse its discretion in allowing an expert in document examination to compare writings spray-painted on the wall of the murder scene with defendant's known writings in documents. Although there is some difficulty in comparing

writing in documents with spray-painted writing on a wall, the expert merely pointed out similarities between the writings and never identified defendant as the actual author of the wall writing. The jury, which saw photographs of the wall writing was thus free to accept or reject the expert's testimony. Defense counsel thoroughly cross-examined the expert, and presented his own expert who cast doubt on the ability to make such comparisons.

4. The admission of testimony about defendant's internet provider (IP) addresses did not violate his right to confrontation. The IP addresses were used to show that defendant sent the email threats that allegedly came from a third party who had a motive to harm the decedent. The IP addresses were obtained from Google's records and were kept in the ordinary course of business. Business records are created for the administration of a company's affairs, not for the purpose of providing evidence at trial. As such, they were not testimonial in nature and thus did not violate the confrontation clause.

5. The trial court properly admitted the testimony of an officer who reviewed Master Card statements and determined that spray paint was purchased using a credit card traced to defendant. Illinois Rule of Evidence 803(24) provides an exception to the hearsay rule and allows a receipt or paid bill to serve as prima facie evidence of the fact of a payment.

§19-17

People v. Whitfield, 2014 IL App (1st) 123135 (No. 1-12-3135, 12/12/14)

Under 725 ILCS 5/115-12, an out-of-court statement of identification is an exception to the hearsay rule if the witness testifies at trial and is subject to cross-examination about the statement. Here, the witness testified that he witnessed the shooting but was unable to identify defendant as the perpetrator. The State introduced the witness's out-of-court statement that defendant was the shooter.

Defendant argued that the out-of-court statement was inadmissible because the witness did not make an in-court identification of defendant and testified that he had never made such an identification. Defendant relied on **People v. Stackhouse**, 354 Ill. App. 3d 265 (1st Dist., 2004) for the proposition that an out-of-court statement of identification under 115-12 is not admissible when the witness unequivocally denies at trial that he made an out-of-court identification.

The court declined to follow **Stackhouse**, and instead held that there is no requirement in 115-12 that the witness confirm in his testimony that he made an identification. Thus even though the witness in this case denied identifying defendant as the shooter, his out-of-court statement of identification was substantively admissible under 115-12.

FITNESS TO STAND TRIAL

Ch. 21

People v. Cook, 2014 IL App (2d) 130545 (No. 2-13-0545, 12/23/14)

1. Due process prohibits the prosecution of a defendant who is unfit to stand trial. A defendant is unfit where, based upon a mental or physical condition, he is unable to understand the nature and purpose of the proceedings or assist in his defense.

Although the trial court's decision concerning fitness is usually reviewed under the abuse of discretion standard, the record is required to show that the court affirmatively exercised its judicial discretion when determining fitness. The trial court's failure to exercise its discretion when determining fitness concerns a substantial right and therefore can be reviewed under the plain error rule.

A determination that a defendant is fit may not be based solely on a stipulation to psychiatric conclusions or findings. Where the parties stipulate to an expert's testimony rather than to his or her conclusions, the trial court may consider the stipulation in exercising its discretion. However, the decision as to fitness must be made by the trial court, not by the experts. In other words, the trial court must analyze and evaluate the basis for the expert's opinion and may not merely rely on the expert's ultimate conclusion.

2. The record failed to show that the trial court exercised its discretion in determining that defendant was fit. The parties stipulated that the expert would testify consistently with his report "finding the defendant fit to stand trial." The record did not indicate that the trial judge ever reviewed the report, which it received just before entering an order that defendant was fit. The trial judge did not discuss the basis for finding defendant to be fit, and did not question defendant or the attorneys on the issue of fitness. "[W]ithout anything to indicate that the court actually reviewed the report or knew of the basis for the finding, the record is at best ambiguous as to whether the court exercised its discretion as opposed to merely relying on [the expert's] ultimate conclusion."

3. The court stated:

> [I]t is incumbent upon the court to make a record reflecting that it did more than merely base its fitness finding on the stipulation to the expert's ultimate conclusion. The court must state on the record the factual basis for its finding, which must be more than a mere acceptance of a stipulation that the defendant is fit or that an expert found the defendant fit. . . . [H]ad the court stated that it read the report and agreed with [the expert's] conclusion based on the facts set out in the report, or had it recited the facts it relied on in making its own fitness determination, there would have been no ambiguity about the court's exercise of discretion.

4. In most cases where more than a year has passed since the original trial and sentencing, due process cannot be satisfied by a retrospective fitness determination. In exceptional cases, however, the issue of fitness at the time of trial may be fairly and accurately determined after the fact. **People v. Neal**, 179 Ill. 2d 541, 689 N.E.2d 1040 (1997). The court concluded that a retrospective fitness determination would satisfy due process in this case because the parties stipulated to all of the evidence and the judge could determine whether defendant was fit when he pleaded guilty and was sentenced. The cause was remanded for a retrospective determination of fitness.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

Ch. 21

People v. McCoy, 2014 IL App (2d) 130632 (No. 2-13-0632, 12/22/14)

There is no constitutional right to a jury at a fitness hearing. However, 725 ILCS 5/104-12 provides that the defense or the State may demand a jury, or the court may on its own motion order a jury, except in specified circumstances. The court concluded that unless the statutory exceptions apply, a person whose fitness is being litigated has a statutory right to personally demand a jury determination of fitness. Thus, the trial court erred by failing to respond to defendant's repeated demands that his fitness be determined by a jury.

The court rejected the argument that a different result is required by **People v. Holt**, 2013 IL App (2d) 120476. **Holt** involved not whether the defendant could demand a jury determination of fitness, but whether a defense attorney is obligated to adopt the defendant's wishes and argue for a finding of fitness even where he or she believes that the defendant is unfit.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

GUILTY PLEAS

§§24-3, 24-6(a)

People v. Holloway, 2014 IL App (1st) 131117 (No. 1-13-1117, mod. op. 12/29/14)

1. Where a guilty plea is based on a plea agreement, the terms of the agreement must be stated in open court. Supreme Court Rule 402(b). In addition, Rule 402 requires that the trial court confirm the terms of the agreement by questioning the defendant personally in open court and determining whether force or threats or promises apart from the plea agreement were used to obtain the plea. Whether reversal is required

because the trial court failed to give the required admonishments depends on whether real justice has been denied or defendant was prejudiced by the inadequate admonishments.

2. Defendant pleaded guilty under an agreement which provided that if he swore to the facts alleged by the State (which were based on defendant's post-arrest comments), he would receive boot camp. However, if defendant did not respond consistently with his prior statements, he would be sentenced to seven years imprisonment. The terms of the agreement were not stated in open court or explained to defendant by the trial judge. Instead, defense counsel said that he had explained the agreement to defendant and that defendant wanted to accept the offer of boot camp with a condition that he swear under oath to the facts alleged by the State. So far as the record showed, defendant was never advised of the possibility of a seven-year-sentence or of the specific facts to which he was required to swear in order to receive boot camp.

The court concluded that because the trial court failed to explain the terms of the plea agreement in open court and ascertain defendant's knowledge of those terms, it was impossible to determine whether defendant fully understood the consequences of his plea. Because the defendant was prejudiced by the trial court's failure to comply with Rule 402(b), plain error occurred.

The trial court's denial of the motion to withdraw the guilty plea was reversed, defendant's conviction and sentence were vacated, and the cause was remanded for further proceedings.

(Defendant was represented by Assistant Defender Cassidy Keilman, Chicago.)

§24-8(a)

People v. Guzman, 2014 IL App (3rd) 090464 (No. 3-09-0464 & 3-10-0802, 12/11/14)

1. Before accepting a plea of guilty, guilty but mentally ill, or nolo contendere, the trial court must admonish the defendant that if he or she is not a United States citizen, the conviction may result in deportation, exclusion from admission to the United States, or denial of naturalization. 725 ILCS 5/113-8. In **People v. Delvillar**, 235 Ill. 2d 507, 922 N.E.2d 330 (2009), the Illinois Supreme Court held that because immigration consequences are collateral to a plea, the failure to admonish of potential immigration ramifications does not affect the voluntariness of the plea. Thus, the trial court's failure to admonish pursuant to §113-8 requires reversal only if real justice has been denied or defendant has been prejudiced by the inadequate admonishment. Prejudice is shown where the defendant shows that he was subject to potential immigration penalties or that he would not have pleaded guilty had he been admonished of the potential immigration consequences.

The post-conviction petitioner failed to show any prejudice from the trial court's failure to admonish him concerning the immigration consequences of his guilty plea where the post-plea motion stated only that defendant wanted to withdraw his plea, without alleging that he was subject to potential immigration consequences or that he would not have entered a guilty plea had he been admonished of those consequences. Furthermore, defense counsel at no time informed the court that defendant was subject to immigration consequences. Under these circumstances, it was not an abuse of discretion to deny defendant's motion to withdraw the guilty plea.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

§24-8(a)

People v. Holm, 2014 IL App (3rd) 130583 (No. 3-13-0583, 12/8/14)

1. A defendant does not have a right to withdraw a guilty plea. Instead, leave to withdraw a plea is permitted as required to correct a manifest injustice under the facts of the particular case. Whether to grant leave to withdraw is left to the discretion of the trial court, whose decision will not be disturbed on appeal unless it appears that the plea was entered through a misapprehension of the facts or the law or there is doubt of the defendant's guilt and the ends of justice would be served by holding a trial. Before accepting a guilty plea, the trial court must ensure that the defendant's conduct supports the charge to which he or she is pleading guilty.

2. Defendant's motion to withdraw his plea should have been granted. Defendant and his father were charged with the offense of hunter interference for creating noise in an attempt to interfere with hunters on adjacent property. Defendant represented himself and reached a plea agreement by which he would avoid jail time and be able to continue to support his grandmother and disabled brother.

The father represented himself at a jury trial and was convicted. However, in the father's appeal the Appellate Court found that the statute creating the offense of hunter interference did not apply to the conduct of defendant and his father because they were at all times engaged in the lawful use of their property.

The court concluded that because defendant's conduct did not constitute the offense to which he pleaded guilty, the interests of justice required that he be allowed to withdraw his plea.

§24-8(b)(1)

People v. Bernard, 2014 IL App (2d) 130924 (No. 2-13-0924, 12/10/14)

When defense counsel fails to file a Rule 604(d) certificate, the appropriate remedy is to remand for the filing of the certificate, the opportunity to file a new motion to withdraw if one is necessary, and a new motion hearing. Once the reviewing court remands a case for the potential filing of a new motion, the previous order denying the motion to withdraw has been vacated and is nullified, canceled, and void.

Here defendant pled guilty on December 9, 2011 and was sentenced on February 8, 2012. On February 15, 2012, defendant filed a timely motion to reduce sentence. On June 22, 2012, while the motion to reduce was still pending, defendant filed a motion to withdraw her guilty plea. The trial court denied the motion to withdraw on the alternative grounds of untimeliness and lack of merit.

Counsel failed to file a 604(d) certificate and the Appellate Court remanded for compliance with Rule 604(d). On remand, counsel filed an amended motion to withdraw. The trial court denied the new motion holding that it lacked jurisdiction to consider the motion since it had not been timely filed and defendant never asked for an extension of time.

On appeal from the second denial, the Appellate Court held that when it remanded the case for 604(d) compliance it vacated the trial court's previous order denying defendant's motion to withdraw. And when counsel filed a new motion to withdraw it superseded the previous motion.

The trial court, however, appeared confused by the status of defendant's prior motion, since it found that it lacked jurisdiction based on the untimely filing of that motion. But since the order denying the prior motion had been vacated, the trial court could not properly deny the new motion because the prior motion was untimely.

The Appellate Court remanded the case to the trial court and specifically stated that the case now returned to the trial court as it existed when defendant was initially sentenced on February 8, 2012, and ordered that counsel be granted reasonable time to file a new motion to withdraw, if deemed necessary, along with a new Rule 604(d) certificate.

JURY

§32-4(a)

People v. Belknap, 2014 IL 117094 (No. 117094, 12/18/14)

1. At the time of trial, Supreme Court Rule 431(b) required the trial court to ask each potential juror whether he or she understood and accepted several principles, including: (1) the presumption of innocence, (2) the reasonable doubt standard; (3) that the defendant is not required to offer evidence; and (4) that the defendant's failure to testify could not be held against him. The Supreme Court reiterated that the trial judge is required to ask not only whether the prospective juror accepts such principles but also whether he or she understands them. The court accepted the State's concession that the trial judge erred by asking prospective jurors only whether they accepted the Rule 431(b) principles and not also whether they understood them.

2. The trial court's failure to comply with Supreme Court Rule 431(b) can constitute plain error only under the first prong of the plain error test, for clear or obvious error where the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant. **People v. Thompson**, 238 Ill. 2d 598, 939 N.E.2d 403 (2010). When reviewing a forfeited claim under the first prong of the plain error doctrine, the reviewing court must undertake a commonsense analysis of all of the evidence in context.

After examining the evidence, the Supreme Court rejected the Appellate Court's holding that the evidence was closely balanced. Although there were no eyewitnesses to the crime, other evidence pointed to the defendant as the perpetrator and excluded any reasonable possibility that someone else inflicted the injuries on the decedent. In addition, the testimony of two jailhouse informants concerning defendant's statements was consistent although the informants were not in the jail at the same time and there was no evidence that they had communicated with each other about defendant. The court concluded that viewing the evidence in a common sense manner under the totality of circumstances, the evidence was not closely balanced. Defendant's conviction for first degree murder was affirmed.

3. In a concurring opinion, Justice Burke found that **Thompson** was wrongly decided. Justice Burke would have held that Rule 431(b) errors should be considered under the fundamental fairness prong of the plain error rule and not under the closely balanced evidence prong. Thus, plain error occurs where the unasked question creates a likelihood of bias that would prevent the jury from returning a verdict according to the facts and the law.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

§32-4(a)

People v. Short, 2014 IL App (1st) 121262 (No. 1-12-1262, mod. op. 12/3/14)

At defendant's trial for attempt first degree murder, unlawful possession of a firearm by a gang member, aggravated unlawful use of a weapon, and aggravated battery with a firearm, the trial court admonished the venire that evidence of gang membership might be presented and asked whether the veniremembers would be able to afford defendant a fair trial in light of such testimony. After the jury was selected, defendant pleaded guilty to unlawful possession of a firearm by a gang member - the only charge to which the gang membership evidence was relevant - and aggravated unlawful use of a weapon. The trial court denied defense counsel's request to have the venire dismissed and a new jury selected, but informed the jury that contrary to the earlier statements no gang evidence would be presented.

The court concluded that the trial court did not err during *voir dire* by informing the jury that gang membership evidence might be introduced. At that point, defendant had not expressed a willingness to plead guilty to unlawful possession of a firearm by a gang member, and had merely unsuccessfully sought to have a bench trial on that charge. Thus, the trial court admonished the venire in accordance with its reasonable expectation that gang-related evidence would be presented. Once defendant pleaded guilty to the only charge on which such evidence could have been admitted, the judge properly instructed the jury that despite the earlier statements, no gang evidence would be presented.

The court added that even if the trial court erred, defendant was not prejudiced. A defendant facing charges that require evidence of gang membership is entitled to have the jury questioned during *voir dire* to determine if he will be prejudiced by admission of such evidence. **People v. Thompson**, 2013 IL App (1st) 113105. Here defense counsel was satisfied after *voir dire* that the jurors would not hold evidence of gang membership against defendant. There is no basis to argue that the jury could no longer be fair and impartial after it was told that gang evidence would not be presented.

Although defendant speculated that the jury would likely assume that he was guilty of the charges that were dropped, the court found that it is "[e]qually possible that the jury assumed the State dropped the charges because it would not be able to prove them." The court also noted that the jury acquitted defendant of attempt first degree murder and convicted only on a lesser charge, further establishing that it was likely not affected by the trial court's reference to gang evidence.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Jessica Ware, Chicago.)

NARCOTICS

§35-1

People v. Presa, 2014 IL App (3rd) 130255 (No. 3-13-0255, 12/18/14)

720 ILCS 635/1 creates the offense of unlawful possession of hypodermic syringes or needles. 720 ILCS 635/1(a) provides that other than as provided in §635/1(b), a person who is not "engaged in chemical, clinical, pharmaceutical or other scientific research" may not possess hypodermic needles. §635/1(b) provides that a person who is at least 18 may possess up to 20 hypodermic needles which he or she has purchased from a pharmacy.

Defendant was a participant in the Chicago Recovery Alliance, which was a non-profit group which allowed persons who were accepted in the program and who had coded program cards to obtain as many clean needles as they wanted, without any requirement that they exchange dirty needles. The purpose of the program was to fight the spread of HIV and Hepatitis B and C. Participants were asked a series of questions that were compiled for research purposes.

The State conceded that CRA was an entity that was engaged in "chemical, clinical, pharmaceutical or other scientific research." Furthermore, the court found that by definition the term "clinical . . . scientific research" includes not only researchers but also persons or patients who participate in research studies. Because defendant was a current participant in the program, he was engaged in "clinical scientific research" for purposes of §635/1(b). Therefore, the conviction was reversed.

(Defendant was represented by Assistant Defender Editha Rosario-Moore, Ottawa.)

§35-3(c)(1)

People v. Pittman, 2014 IL App (1st) 123499 (No. 1-12-3499, 12/23/14)

The simultaneous possession of different types of controlled substances will not support more than one conviction and sentence unless the statute expressly authorizes multiple convictions. **People v. Manning**, 71 Ill.2d 132, 374 N.E.2d 200 (1978). Where defendant threw 1.8 grams of heroin into a garbage can as he was fleeing police, and after his arrest led police to an additional 3.1 grams of heroin concealed in the wheel well of a boat located in an adjacent vacant lot, the court found that defendant engaged in separate rather than simultaneous acts of possession.

An "act" is any overt or outward manifestation which will support a different offense. Here, there was evidence to support a finding of an act of actual possession of the heroin which defendant discarded while fleeing the police. In addition, there was

separate evidence of an independent act of constructive possession of the heroin found in the boat. Under these circumstances, two acts of possession occurred.

Even where more than one act occurred, multiple convictions are permitted only if the State apportioned each act to separate charges in the indictment or information. That requirement was satisfied here, because the State charged separate offenses based on the separate acts.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

PROBATION

§§40-1, 40-3(a), 40-3(c)

People v. Daly, 2014 IL App (4th) 140624 (No. 4-14-0624, 12/1/14)

1. Generally, Illinois law creates a presumption in favor of probation. For most offenses, 730 ILCS 5/5-6-1(a) requires a sentence of probation unless the court finds that a prison sentence is necessary for the protection of the public or that probation would deprecate the seriousness of the offense. In making the latter determination, the trial court is statutorily required to consider the nature and circumstances of the offense and the history, character and condition of the offender. The trial court is presumed to have considered only proper sentencing factors unless the record affirmatively shows otherwise.

2. The trial court abused its discretion when it rejected probation and imposed a 42-month-sentence for reckless homicide. First, the trial court repeatedly stated that the public policy of the aggravated DUI statute requires incarceration, although defendant pleaded guilty to reckless homicide and the aggravated DUI counts were dismissed. In addition, the trial court compared the instant case to others in which sentences have been imposed for DUI, a further indication that the sentence was based on the dismissed charges and not on the offense to which the defendant pleaded guilty.

Second, the trial court ignored the circumstances of the reckless homicide offense of which defendant was convicted. The factual basis for the plea indicated that the ATV which defendant was driving on private property skidded when turning on wet gravel. The vehicle overturned and threw out the decedent. Although defendant admitted that she had been drinking, the factual basis did not state that she was intoxicated or that she drove under the influence of alcohol, or even that she was speeding. Under these circumstances, the trial court's emphasis on the fact that defendant chose to drink and drive ignored the circumstances of the reckless homicide and resulted in defendant being sentenced as if she had pleaded guilty to aggravated DUI.

Third, the trial court stated that it was imposing incarceration in order to deter similar offenses. However, the Illinois Supreme Court has found that deterrence has

little significance where an offense involves unintentional conduct. **People v. Martin**, 119 Ill. 2d 453, 519 N.E.2d 884 (1988).

Fourth, the trial judge ignored the defendant's history, character and rehabilitative potential. The evidence showed that defendant is a 24-year-old nurse with no prior convictions. In addition, she does not have a drug or alcohol problem and is the single parent of a 20-month-old son. Furthermore, the decedent was the defendant's cousin, and the decedent's family, the community, and the prosecution all supported a probation sentence.

Fifth, the trial court's comments at sentencing indicated a predisposition against probation for certain types of offenders. A trial judge may not refuse to consider an authorized sentence merely because the defendant is in a class that is disfavored by that judge. Here, the trial court appeared to believe that any offender who drives after drinking should not receive probation if a death results, no matter what offense is charged and without regard for the specific facts of the case. "Such a position results in an arbitrary denial of probation and frustrates the intent of the legislature to provide for a range of sentencing possibilities."

Sixth, the trial judge considered as aggravation a factor inherent in the offense of reckless homicide where it did not merely note the decedent's death in passing, but clearly focused on the death when imposing incarceration.

3. Where the trial court abused its discretion at sentencing, Supreme Court Rule 615(b)(4) authorizes the reviewing court to reduce the sentence. The Appellate Court reduced defendant's sentence to probation and remanded the cause with directions to impose appropriate probation conditions. Furthermore, to remove any suggestion of unfairness, the court ordered that the case be assigned to a different judge on remand.

REASONABLE DOUBT

§42-1

People v. Johnson, 2014 IL App (1st) 122459-B (No. 1-12-2459, 12/31/14)

Under 720 ILCS 5/5-2(c) a person is accountable for the conduct of another if "either before or during the commission of an offense, with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." Accountability cannot be established by merely showing that the defendant knew of or consented to the commission of the offense. It also cannot be established by defendant's mere presence at the scene of the crime even if coupled with defendant's flight from the scene or his knowledge that a crime has occurred.

Here, the State's evidence showed that defendant was driving a car with his co-defendant as a passenger. At some point, co-defendant saw a man named Brandon driving another vehicle. Co-defendant identified Brandon as the "dude that shot me," and told defendant to chase him. Defendant pursued the other car and eventually stopped in front of it. Co-defendant got out of the car, pulled out a gun, and fired several shots at Brandon. Brandon tried to drive away and in the process struck defendant's car. Defendant drove down the street and while co-defendant was still firing the gun, told him to "come on or I'm going to leave you." Co-defendant ran towards defendant's car still firing his gun. Co-defendant got back in the car and defendant drove away. Brandon eventually died from the gunshots. Defendant later told an acquaintance that co-defendant had been armed, and they had "made a move" on (meaning shot) a man in another vehicle.

The Appellate Court held that this evidence failed to prove that defendant was guilty by accountability for first degree murder. Even though he drove the co-defendant to the scene of the crime and then helped him escape, there was no evidence that defendant was involved in any advanced planning or had a prior intent to facilitate the shooting since defendant did not even know the co-defendant before he entered the car, let alone that he was armed and intended to shoot someone.

There was also no evidence that defendant participated in a common criminal design since defendant did nothing to assist the co-defendant during the crime. Driving someone away from the scene of the crime does not establish accountability. Nor does presence at the crime scene coupled with knowledge that a crime has occurred and subsequent flight.

The fact that co-defendant identified Brandon as the man who shot him does not prove that defendant intended to help him shoot Brandon. And even though co-defendant instructed defendant to chase Brandon, there was no evidence as to why co-defendant asked him to do this. Defendant's statement to an acquaintance that co-defendant was armed and they "made a move" on Brandon were merely after-the-fact accounts of the events and do not establish what defendant's intent was prior to the shooting. They also do not show when defendant learned that co-defendant was armed. As a result, the Appellate Court concluded that the State failed to prove beyond a reasonable doubt that defendant intended to facilitate the murder either before or during the shooting. The court therefore reversed defendant's first degree murder conviction.

SEARCH AND SEIZURE

§§44-4(b), 44-12(a)

Heien v. North Carolina, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (No. 13-604, 12/15/14)

1. To justify a traffic stop, an officer must have a "reasonable suspicion" of criminal activity. The Supreme Court found that "reasonable suspicion" may be present where the officer thinks that the driver is violating a valid law, but is mistaken in the belief that the law in question covers the driver's conduct. The court noted precedent holding that seizures may be reasonable even if based on mistakes of fact, and concluded that mistakes of law are equally compatible with the concept of "reasonable suspicion."

2. No Fourth Amendment violation occurred where a police officer stopped defendant's car because one of the brake lights was malfunctioning, but State law as subsequently interpreted by the State Court of Appeals required only one working brake light. The court concluded that North Carolina law was sufficiently ambiguous that it was reasonable for the officer to believe that all original equipment brake lights were required to be operating properly. Because the stop was reasonable, cocaine which the officer found in a consensual search was properly admitted at a trial for attempted cocaine trafficking.

3. In a concurring opinion, Justices Kagan and Ginsberg stressed that only reasonable mistakes of law can justify a stop, and that the subjective understanding of an officer is completely irrelevant. The concurrence also stressed the majority's holding that an error in judgement concerning the scope of the Fourth Amendment cannot constitute a "reasonable" mistake. Finally, the concurring justices stressed that for an officer's legal error to be considered reasonable, a "really difficult" or "very hard question of statutory interpretation" must be presented.

§§44-6(a), 44-6(c)(3)

People v. Jackson, 2014 IL App (3rd) 120239 (No. 3-12-0239, 12/4/14)

1. Third party information will support a finding of probable cause sufficient to justify a warrantless arrest if the information bears some independent indicia of reliability. An indicia of reliability exists where the facts learned through the police investigation independently verify a substantial part of the information provided by the third party. Furthermore, the personal reliability of the third party must be considered as part of the totality of the circumstances in determining whether probable cause exists.

2. The Appellate Court found that the police lacked probable cause to arrest the defendant for murder. The offense occurred some six months prior to the arrest. An

eyewitness was questioned several times, but failed to identify the shooter until some six months later, when the witness was incarcerated on an unrelated offense. The eyewitness testified at the suppression hearing that he told officers he did not know who committed the offense, but that the officers "pushed" defendant's picture "down my throat" and were "hellbent" that he identify defendant as the perpetrator.

After interviewing the eyewitness, one of the officers then sent out a "49 message" directing patrol officers to arrest defendant for murder. The record was unclear whether officers failed to seek an arrest warrant or whether their request for a warrant was denied.

The court noted that in denying the motion to suppress, the trial court erroneously found that the credibility of the eyewitness on whose statements the arrest was based was irrelevant to the issue of probable cause. In addition, the trial judge erred by basing its finding of probable cause solely on the eyewitness's photo identification of defendant, without considering all of the evidence including the inability of the police to develop any evidence which corroborated the eyewitness's account. Under the totality of circumstances, the evidence was insufficient to support a finding of probable cause.

Because the trial court erroneously denied the motion to suppress, the conviction was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

§44-7(f)

People v. Voss, 2014 IL App (1st) 122014 (No. 1-12-2014, 12/17/14)

1. Under **Franks v. Delaware**, 438 U.S. 154 (1978), a defendant may obtain a hearing challenging the veracity of the affidavits supporting a search warrant by making a substantial preliminary showing that an intentionally, knowingly, or recklessly false statement was included by the affiant in the warrant affidavit, and that the false statement was necessary to finding probable cause. A substantial preliminary showing lies somewhere between mere denial and proof by a preponderance.

The trial court's denial of a **Franks** hearing is reviewed under an abuse of discretion standard. Given the fluidity of relevant factors in reviewing this decision, the abuse of discretion standard will often be determinative. Because there is no formula for deciding whether a trial court made the correct decision in granting or denying a hearing, as long as the decision is not arbitrary or fanciful, the decision should be affirmed.

2. The court identified 10 non-exhaustive factors to consider in reviewing the trial court's decision:

(a) whether defendant's motion is supported by affidavits from interested or disinterested parties;

(b) whether there is objective evidence to corroborate defendant's affidavits;

(c) whether the information in the affidavits would make it impossible for the confidential informant's testimony to be true;

(d) whether defendant has asserted an actual alibi or just a general denial;

(e) whether the information supporting probable cause has been supplied by an informant or other confidential source;

(f) whether the warrant affiant took steps to corroborate information from the informant;

(g) the facial plausibility of information provided by an informant;

(h) whether the affiant had prior experience with the informant;

(i) whether there are reasons to disbelieve the informant; and

(j) whether the informant appeared before the issuing magistrate.

3. Here a police officer submitted a sworn affidavit in support of a search warrant stating that a confidential informant purchased cannabis from defendant at defendant's apartment on February 14, 2011. The officer averred that he later drove the informant to defendant's apartment to confirm the location and also confirmed that the nickname the informant used belonged to defendant. Both the informant and the officer appeared before the issuing magistrate.

Defendant filed a motion for a **Franks** hearing claiming that he sold no drugs from his apartment on February 14, 2011, and had not even been home for the majority of the day. In support of the motion, defendant attached his own affidavit and affidavits from other residents of his apartment including his girlfriend and two roommates. All averred that no drug sales occurred that day and that defendant had been gone for the majority of the day. The trial court denied the motion.

4. The Appellate Court affirmed the denial, holding that the majority of the factors supported the trial court's decision. Defendant's affidavits were from interested parties and there was no objective evidence to corroborate the affidavits. The affidavits did not make it impossible that the informant's testimony was true since they only established that defendant was away from the apartment for part of the day. That also meant that they were not true alibis, but only mere denials. Finally, the officer corroborated the informant's information and both of them appeared before the magistrate. Under these circumstances, the trial court did not abuse its discretion in denying the motion.

(Defendant was represented by Assistant Defender Benjamin Wimmer, Chicago.)

SENTENCING

§45-1(a)

People v. Mischke, 2014 IL App (2d) 130318 (No. 2-13-0318, 12/29/14)

Under 625 ILCS 5/11-501(d)(2)(A), a person convicted of aggravated driving while under the influence (DUI) is guilty of a Class 4 felony. But under subsection (d)(2)(B), a third violation of "this Section" is a Class 2 felony. The trial court sentenced defendant for aggravated DUI as a Class 2 felony. Defendant argued on appeal that he should have been sentenced as a Class 4 felony since he had two prior convictions for non-aggravated DUI, and the statute requires two prior convictions for aggravated DUI.

The Appellate Court held that the language of subsection (d)(2)(B), "this Section," refers to all of section 11-501, not simply to subsection (d)(2)(B). Section 11-501 includes non-aggravated as well as aggravated DUI, while subsection (d)(2)(B) only includes aggravated DUI. The enhancement to a Class 2 felony thus occurs whenever a defendant has two prior convictions for any form of DUI, not just aggravated DUI. The trial court therefore properly sentenced defendant to a Class 2 felony.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

§§45-4(a), 45-4(d), 45-4(h), 45-5, 45-14(b)

People v. Daly, 2014 IL App (4th) 140624 (No. 4-14-0624, 12/1/14)

1. A sentence may be deemed "excessive" where it is within the statutory range authorized for an offense but does not adequately account for the defendant's rehabilitative potential. The Illinois Constitution requires that penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. This constitutional mandate requires the trial court to balance the retributive and rehabilitative purposes of punishment and to carefully consider all factors in aggravation and mitigation.

Because the trial court has a superior opportunity to assess a defendant's credibility and demeanor, deference is afforded to its sentencing judgment. However, "the Appellate Court was never meant to be a rubber stamp for the sentencing decisions of trial courts" and may modify a statutorily authorized sentence if the sentencing court abused its discretion.

2. Generally, Illinois law creates a presumption in favor of probation. For most offenses, 730 ILCS 5/5-6-1(a) requires a sentence of probation unless the court finds that a prison sentence is necessary for the protection of the public or that probation would deprecate the seriousness of the offense. In making the latter determination, the trial court is statutorily required to consider the nature and circumstances of the offense and

the history, character and condition of the offender. The trial court is presumed to have considered only proper sentencing factors unless the record affirmatively shows otherwise.

3. The trial court abused its discretion when it rejected probation and imposed a 42-month-sentence for reckless homicide. First, the trial court repeatedly stated that the public policy of the aggravated DUI statute requires incarceration, although defendant pleaded guilty to reckless homicide and the aggravated DUI counts were dismissed. In addition, the trial court compared the instant case to others in which sentences have been imposed for DUI, a further indication that the sentence was based on the dismissed charges and not on the offense to which the defendant pleaded guilty.

Second, the trial court ignored the circumstances of the reckless homicide offense of which defendant was convicted. The factual basis for the plea indicated that the ATV which defendant was driving on private property skidded when turning on wet gravel. The vehicle overturned and threw out the decedent. Although defendant admitted that she had been drinking, the factual basis did not state that she was intoxicated or that she drove under the influence of alcohol, or even that she was speeding. Under these circumstances, the trial court's emphasis on the fact that defendant chose to drink and drive ignored the circumstances of the reckless homicide and sentenced the defendant as if she had pleaded guilty to aggravated DUI.

Third, the trial court stated that it was imposing incarceration in order to deter similar offenses. However, the Illinois Supreme Court has found deterrence has little significance where an offense involves unintentional conduct. **People v. Martin**, 119 Ill. 2d 453, 519 N.E.2d 884 (1988).

Fourth, the trial judge ignored the defendant's history, character and rehabilitative potential. The evidence showed that defendant is a 24-year-old nurse with no prior convictions. In addition, she does not have a drug or alcohol problem and is the single parent of a 20-month-old son. Furthermore, the decedent was the defendant's cousin, and the decedent's family, the community, and the prosecution all supported a probation sentence.

Fifth, the trial court's comments at sentencing indicated a predisposition against probation for certain types of offenders. A trial judge may not refuse to consider an authorized sentence merely because the defendant is in a class that is disfavored by that judge. Here, the trial court appeared to believe that any offender who drives after drinking should not receive probation if a death results, no matter what offense is charged and without regard for the specific facts of the case. "Such a position results in an arbitrary denial of probation and frustrates the intent of the legislature to provide for a range of sentencing possibilities."

Sixth, the trial judge considered as aggravation a factor inherent in the offense of reckless homicide where it did not merely note the decedent's death in passing, but clearly focused on the death when imposing incarceration.

4. Where the trial court abused its discretion at sentencing, Supreme Court Rule 615(b)(4) authorizes the reviewing court to reduce the sentence. The Appellate Court reduced defendant's sentence to probation and remanded the cause with directions to impose appropriate probation conditions. Furthermore, to remove any suggestion of unfairness, the court ordered that the case be assigned to a different judge on remand.

§45-4(h)

People v. Cervantes, 2014 IL App (3d) 120745 (No. 3-12-0745, 12/3/14)

It is a violation of due process for a trial court to make a sentencing determination based upon private investigation or knowledge. Here, at the end of the sentencing hearing, the court left the bench to look up life expectancy tables. The court then imposed a sentence equal to defendant's life expectancy (33 years imprisonment).

The Appellate Court held that the trial court's actions were plain error. Neither party asked the court to consider defendant's life expectancy and neither party had a chance to review or evaluate the court's information. The trial court thus improperly imposed a sentence based on his own private investigation.

The dissenting justice would have held that the record did not support a finding that the trial court relied on life expectancy in imposing sentence. The reference about life expectancy came in a single comment amid a thorough discussion of proper sentencing factors. Accordingly, the dissent would have affirmed defendant's sentence.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

§§45-7(a), 45-18(a)

People v. Hanson, 2014 IL App (4th) 130330 (No. 4-13-0330, 12/30/14)

Under 730 ILCS 5/5-4.5-50(d) a defendant must file a written motion challenging "the correctness of a sentence or any aspect of the sentencing hearing" within 30 days of the imposition of sentence. The written post-sentencing motion allows the trial court to review defendant's contentions of sentencing error and save the delay and expense of waiting until appeal to correct any errors. It also gives the Appellate Court the benefit of the trial court's reasoned judgment on potential issues.

1. Defendant argued that although he was eligible for an extended-term sentence for domestic battery based upon prior felony convictions for retail theft and aggravated robbery (as listed in the pre-sentence investigation report), the trial court improperly

imposed an extended-term sentence based upon a mistaken belief that defendant had a prior Class 4 felony conviction for domestic battery (as argued by the State).

The Appellate Court declined to address the merits of defendant's claim. His claim was based entirely on the trial court misunderstanding his criminal history, but defendant made no effort to point this error out at trial and create a clear record of the trial court's actual basis for imposing the sentence. By raising the issue for the first time on appeal, defendant was essentially asking the Appellate Court to "use the transcript of the sentencing hearing as a crystal ball" to understand the trial court's thinking. The Appellate Court refused to engage in "mind-reading" and thus would not review the issue.

The court also held that the plain-error rule did not apply. The court rejected other Appellate Court decisions holding that sentencing errors involving a misapplication of law are reviewable as plain error since the right to be sentenced lawfully affects a defendant's fundamental right to liberty. If all matters involving misapplication of law at sentencing were reviewable as plain error, it would render the forfeiture rule meaningless.

2. The court also declined to review as plain error, despite the State's agreement, defendant's claim that the trial court imposed a restitution order without an evidentiary basis for the correct amount of restitution. It rejected the idea that all sentencing errors are reviewable simply because defendant asserts "a few ten-dollar phrases" such as "substantial rights," "grave error," and the "fundamental right to liberty." Since all sentencing errors arguably involve the fundamental right to liberty, applying plain-error requires a more in-depth analysis, requiring a defendant to explain why the sentencing error in his particular case merits plain-error review.

Here, neither defendant nor the State attempted to explain why the trial court's error was more substantial relative to other types of sentencing errors. The sentence and restitution order were affirmed.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)

TRAFFIC OFFENSES

§50-2(a)

People v. Mischke, 2014 IL App (2d) 130318 (No. 2-13-0318, 12/29/14)

Under 625 ILCS 5/11-501(d)(2)(A), a person convicted of aggravated driving while under the influence (DUI) is guilty of a Class 4 felony. But under subsection (d)(2)(B), a third violation of "this Section" is a Class 2 felony. The trial court sentenced defendant for aggravated DUI as a Class 2 felony. Defendant argued on appeal that he should have

been sentenced as a Class 4 felony since he had two prior convictions for non-aggravated DUI, and the statute requires two prior convictions for aggravated DUI.

The Appellate Court held that the language of subsection (d)(2)(B), "this Section," refers to all of section 11-501, not simply to subsection (d)(2)(B). Section 11-501 includes non-aggravated as well as aggravated DUI, while subsection (d)(2)(B) only includes aggravated DUI. The enhancement to a Class 2 felony thus occurs whenever a defendant has two prior convictions for any form of DUI, not just aggravated DUI. The trial court therefore properly sentenced defendant to a Class 2 felony.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

§50-2(c)

People v. Chiaravalle, 2014 IL App (4th) 140445 (No. 4-14-0445, 12/19/14)

To lay a proper foundation for the admission of breath test results, the State must show that the test was performed in accordance with regulations promulgated by the Illinois State Police. Section 1286.310(a) of the Illinois Administrative Code requires that before obtaining a breath test, the officer shall continuously observe the defendant for at least 20 minutes to ensure that the defendant has not ingested any alcohol or vomited. Substantial rather than strict compliance is required for the 20-minute observation period.

Here the officer was in a room alone with defendant during the 20-minute observation period. The officer told defendant that he was not allowed to do anything, such as belching or vomiting, that would bring alcohol to his mouth. The officer completed paperwork while defendant sat on a bench behind him. The paperwork took approximately 10 minutes. During the 20-minute period, the officer turned around to look at defendant every few minutes. He never heard any noise and saw no evidence that defendant had vomited or regurgitated.

The Appellate Court held that the officer substantially complied with the continuous-observation rule. Although he did not always have defendant in his line of sight, the rule does not require continuous visual observation. Section 1286.310(a) does not specifically define "observation," and the plain and ordinary meaning of the word is not limited to visual observation. Instead it includes the use of all the senses.

The purpose of the rule is to enure that a defendant does not do anything to compromise the accuracy of the test, such as ingesting alcohol or vomiting. But it does not require continuous visual observation to detect these types of activities. Here the officer periodically turned around to visually observe defendant and never heard any sounds that might have indicated defendant had vomited, belched or consumed alcohol.

The officer thus maintained continuous observation through the full use of his senses and substantially complied with the rule.

The trial court's order excluding the breath test was reversed.

UNLAWFUL USE OF A WEAPON

§§53-1, 53-5(c)

People v. Fields, 2014 IL App (1st) 130209 (No. 1-13-0209, 12/31/14)

1. Defendant was convicted of aggravated unlawful use of a weapon under 720 ILCS 5/24-1.6(a)(1), (a)(3)(I), which defines the offense as carrying a pistol, revolver, or other firearm on or about one's person or any vehicle or concealed on or about one's person except when on one's land or legal abode, "or on the land or in the legal dwelling of another person as an invitee with that person's permission." The court rejected defendant's argument that as part of its burden of proof the State was required to show that defendant was not an invitee of a resident of the apartment building in which he was arrested. The court concluded that the General Assembly intended to require the defense to bear the burden of proving by a preponderance of the evidence that a statutory exemption to the AUUW is present.

2. 720 ILCS 5/24-1.6(a)(1), (a)(3)(I), creates the offense of AUUW where a person who is under the age of 21 possesses a firearm under specified circumstances. In **People v. Aguilar**, 2013 IL 112116, the Illinois Supreme Court found that the Class 4 form of AUUW violated the Second Amendment. Here, defendant argued that the blanket prohibition of firearm possession by a person under the age of 21 also violates the Second Amendment.

The court rejected this argument, finding that the limitation of possession of firearms by persons under the age of 21 has historical roots and does not affect conduct at the core of the Second Amendment. Applying the intermediate scrutiny test, the court concluded that the prohibition on handgun possession by persons under the age of 21 is reasonably related to the substantial governmental interests of limiting the possession of firearms by a subset of the general population which is likely to be less responsible and mature and deterring illegal activity by a group of citizens which is at risk for engaging in illegal, gang-related activity.

(Defendant was represented by Assistant Defender Tonya Reedy, Chicago.)

§53-1

People v. Grant, 2014 IL App (1st) 100174-B (No. 1-10-0174, 12/15/14)

1. In **People v. Aguilar**, 2013 IL 112116, the Illinois Supreme Court held that the Second Amendment is violated by provisions of the aggravated unlawful use of a weapon statute which prohibit possession of a loaded or immediately accessible firearm outside the home. Citing its prior decisions, the Appellate Court held that **Aguilar** does not invalidate sections of the aggravated unlawful use of a weapon statute which prohibit carrying a firearm on one's own land, abode, or place of business if "the person possessing the firearm has not been issued a currently valid [FOID] card" (720 ILCS 5/24-1.6(a)(1), (a)(3)(C)), and carrying or possessing a firearm on a public street or land without having been issued a valid FOID card (720 ILCS 5/24-1.6(a)(2), (a)(3)(C)). See also **People v. Henderson**, 2013 IL App (1st) 113294; **People v. Taylor**, 2013 IL App (1st) 110166). The court concluded that requiring a valid FOID card constitutes a meaningful and valid regulation of Second Amendment rights.

2. The court rejected the argument that there was insufficient evidence to establish that defendant had not been issued a currently valid FOID card. Defendant responded in the negative when asked by police whether he had a "current valid FOID card," and he did not present a valid card to the officers. The court rejected defendant's claim that his response to officers meant only that he did not have a FOID card on his person, finding that there was a reasonable basis to believe that no FOID card had been issued. The court also found that there was independent evidence to corroborate defendant's statement because he at no time produced a valid FOID card or requested an opportunity to retrieve such a card, told officers he had purchased the handgun from a "crack head" rather than a licensed firearm dealer, and fled when he saw the police car.

3. The court rejected the argument that the proportionate penalties clause of the Illinois Constitution is violated because possession of a weapon without a valid FOID card is a Class 4 felony under the aggravated unlawful use of a weapon statute, but the misdemeanor offense of violating the FOID Card Act is composed of identical elements. The court found that because the elements of the offenses are not identical, no proportionate penalties violation occurred.

First, the misdemeanor offense occurs when a person acquires or possesses a firearm, while the AUUW offense specifies that the defendant must "carry" the weapon on his person or in a vehicle ((a)(1)) or while on public land ((a)(2)). Second, the AUUW statute excludes possession on one's own land or fixed place of business, while the misdemeanor offense has no such exclusion. Third, the misdemeanor offense requires that defendant have the FOID card in his possession when he acquires or possesses a firearm, while the AUUW statute requires only that defendant has been issued a valid card and not that he have it in his possession.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

VERDICTS

§§55-3(a), 55-3(c)
People v. Gillespie, 2014 IL App (4th) 121146 (No. 4-12-1146, 12/22/14)

1. Under **People v. King**, 66 IL 2d 551, 363 N.E.2d 838 (1977), where more than one offense arises from a series of closely related acts and the offenses are not by definition lesser-included offenses, convictions with concurrent sentences can be entered on all of the offenses. Although the Illinois Supreme Court has identified three possible methods for determining whether one offense is a lesser-included offense of another, the appropriate test for **King** purposes is the abstract elements test. Under this test, a crime is a lesser-included offense if all of its elements are included within a second offense and it contains no element not included in the second offense.

For there to be a lesser included offense under the abstract elements test, it must be impossible to commit the greater offense without also committing the lesser offense. The abstract elements approach does not consider the facts of a crime as charged in the particular charging instrument or as proved at trial.

2. Defendant was convicted of robbery and aggravated criminal sexual assault based on committing a criminal sexual assault during the commission of a felony. The predicate felony for the aggravated criminal sexual assault was the same robbery for which defendant was convicted.

The court concluded that under Illinois law, the predicate offense for a crime is necessarily a lesser-included offense of that crime. Thus, where robbery is the predicate offense for aggravated criminal sexual assault, robbery is by definition a lesser-included offense. The robbery conviction was vacated.

(Defendant was represented by Supervisor Marty Ryan, Springfield.)

§§55-3(a), 55-3(b)
People v. Pittman, 2014 IL App (1st) 123499 (No. 1-12-3499, 12/23/14)

The simultaneous possession of different types of controlled substances will not support more than one conviction and sentence unless the statute expressly authorizes multiple convictions. **People v. Manning**, 71 Ill.2d 132, 374 N.E.2d 200 (1978). Where defendant threw 1.8 grams of heroin into a garbage can as he was fleeing police, and after his arrest led police to an additional 3.1 grams of heroin concealed in the wheel well of a boat located in an adjacent vacant lot, the court found that defendant engaged in separate rather than simultaneous acts of possession.

An "act" is any overt or outward manifestation which will support a different offense. Here, there was evidence to support a finding of an act of actual possession of the heroin which defendant discarded while fleeing the police. In addition, there was separate evidence of an independent act of constructive possession of the heroin found in the boat. Under these circumstances, two acts of possession occurred.

Even where more than one act occurred, multiple convictions are permitted only if the State apportioned each act to separate charges in the indictment or information. That requirement was satisfied here, because the State charged separate offenses based on the separate acts.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

WAIVER - PLAIN ERROR - HARMLESS ERROR

§56-1(b)(10)(a)
People v. Shenault, 2014 IL App (2d) 130211 (No. 2-13-0211, 12/23/14)

Ordinarily, an offer of proof is necessary to preserve a claim of error arising from the exclusion of evidence. An offer of proof informs the trial judge and opposing counsel of the nature of the offered evidence and provides the reviewing court with a record on which it can determine whether exclusion of the evidence was erroneous and prejudicial.

The court found that the failure to make an offer of proof cannot be evaluated under the plain error rule. The first step in applying the plain error doctrine is determining whether reversible error occurred. Where the issue is whether evidence was improperly excluded, the failure to make a proper offer of proof prevents the court from making such a determination.

(Defendant was represented by Assistant Defender Richard Harris, Elgin.)

§§56-2(a), 56-2(b)(6)(b)
People v. Belknap, 2014 IL 117094 (No. 117094, 12/18/14)

1. At the time of trial, Supreme Court Rule 431(b) required the trial court to ask each potential juror whether he or she understood and accepted several principles. The trial court's failure to comply with Supreme Court Rule 431(b) can constitute plain error only under the first prong of the plain error test, for clear or obvious error where the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of its seriousness. **People v. Thompson**, 238 Ill. 2d

598, 939 N.E.2d 403 (2010). When reviewing a forfeited claim under the first prong of the plain error doctrine, the reviewing court must undertake a commonsense analysis of all of the evidence in context.

After examining the evidence, the Supreme Court rejected the Appellate Court's holding that the evidence was closely balanced. Although there were no eyewitnesses to the crime, other evidence pointed to the defendant as the perpetrator and excluded any reasonable possibility that someone else inflicted the injuries on the decedent. In addition, the testimony of two jailhouse informants concerning defendant's statements was consistent although the informants were not in the jail at the same time and there was no evidence they had communicated with each other about defendant. The court concluded that viewing the evidence in a common sense manner under the totality of the circumstances, the evidence was not closely balanced. Defendant's conviction for first degree murder was affirmed.

2. In a concurring opinion, Justice Burke found that **Thompson** was wrongly decided. Justice Burke would have held that Rule 431(b) errors should be considered under the fundamental fairness prong of the plain error rule and not under the closely balanced evidence prong. Thus, plain error occurs where the unasked question creates a likelihood of bias that would prevent the jury from returning a verdict according to the facts and the law.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

§56-2(b)(5)(b)

People v. Hanson, 2014 IL App (4th) 130330 (No. 4-13-0330, 12/30/14)

Under 730 ILCS 5/5-4.5-50(d) a defendant must file a written motion challenging "the correctness of a sentence or any aspect of the sentencing hearing" within 30 days of the imposition of sentence. The written post-sentencing motion allows the trial court to review defendant's contentions of sentencing error and save the delay and expense of waiting until appeal to correct any errors. It also gives the Appellate Court the benefit of the trial court's reasoned judgment on potential issues.

1. Defendant argued that although he was eligible for an extended-term sentence for domestic battery based upon prior felony convictions for retail theft and aggravated robbery (as listed in the pre-sentence investigation report), the trial court improperly imposed an extended-term sentence based upon a mistaken belief that defendant had a prior Class 4 felony conviction for domestic battery (as argued by the State).

The Appellate Court declined to address the merits of defendant's claim. His claim was based entirely on the trial court misunderstanding his criminal history, but defendant made no effort to point this error out at trial and create a clear record of the trial court's

actual basis for imposing the sentence. By raising the issue for the first time on appeal, defendant was essentially asking the Appellate Court to "use the transcript of the sentencing hearing as a crystal ball" to understand the trial court's thinking. The Appellate Court refused to engage in "mind-reading" and thus would not review the issue.

The court also held that the plain-error rule did not apply. The court rejected other Appellate Court decisions holding that sentencing errors involving a misapplication of law are reviewable as plain error since the right to be sentenced lawfully affects a defendant's fundamental right to liberty. If all matters involving misapplication of law at sentencing were reviewable as plain error, it would render the forfeiture rule meaningless.

2. The court also declined to review as plain error, despite the State's agreement, defendant's claim that the trial court imposed a restitution order without an evidentiary basis for the correct amount of restitution. It rejected the idea that all sentencing errors are reviewable simply because defendant asserts "a few ten-dollar phrases" such as "substantial rights," "grave error," and the "fundamental right to liberty." Since all sentencing errors arguably involve the fundamental right to liberty, applying plain-error requires a more in-depth analysis, requiring a defendant to explain why the sentencing error in his particular case merits plain-error review.

Here, neither defendant nor the State attempted to explain why the trial court's error was more substantial relative to other types of sentencing errors. The sentence and restitution order were affirmed.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)